IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 12TH JULY 2007 / 21ST ASHADHA 1929

CRL.A.No. 647 of 2007(A)

SC.526/2005 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA
CP.9/2003 of JUDL. MAGISTRATE OF FIRST CLASS COURT, KATTAKADA

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APPELLANT:

MADHAVAN NAIR, C.NO.1480,
CENTRAL PRISON, TRIVANDRUM.

BY ADV. ADV.R.V.SUJIT KUMAR(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA, REP.BY THE
PUBLIC PROSECUTOR OF THE HON'BLE
HIGH COURT OF KERALA AT ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN,J

CRL.A.NO.647 of 2007

Dated this the 12th day of July, 2007

JUDGMENT

The appellant faced trial for an offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act for the possession of 5 litres of arrack without having any licence or permit on 23.6.1998 at about 5 p.m. To prove the case against the appellant, the prosecution examined PWs.1 to 6 and produced Exts.P1 to P7. MO1 was also produced. No evidence has been adduced for and on behalf of the appellant though he denied the charge when questioned under Section 313 Cr.P.C. The trial court found the appellant guilty under Section 58 of the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1 lakh and in default of of payment of fine to undergo rigorous imprisonment for three months was also ordered. The above judgment is challenged in this appeal.

2. This appeal is filed through the jail authorities. Since the

appellant is not having any counsel on his own choice, a member from the state brief panel has been appointed to argue the case of the appellant. The counsel appearing for the appellant submits that the finding of the trial court that the appellant committed the offence under Section 58 is not legally acceptable as PWs.1 and 2, the independent witnesses are not supporting the prosecution case. Hence the finding of the trial court is incorrect. The counsel further submits that the trial court went wrong in finding that the evidence of PWs.3, 4 and 5 proved the prosecution case that the appellant was found in possession of 5 litres of arrack on the date of incident without analysing the evidence legally. Finally, it is contended that the trial court went wrong in finding that the appellant committed the offence punishable under Section 58 of the Abkari Act as the prosecution has not proved that the appellant had in possession of MO1 which contains arrack knowing that it was transported or imported without paying duty or tax as contemplated under Section 58 of the Abkari Act.

3. In the light of the contentions raised by the counsel, it has to be seen that the trial court relied on the evidence of PWs.3 and 4. Out of the above witnesses, PW3, the Excise Guard who accompanied the Preventive Officer who detected the crime. He has stated that CW4, the Excise Preventive Officer is no more. Hence he was not examined to prove Ext.P1 mahazar. However, PW3 had given evidence before the court that he accompanied CW4 on the date of the incident and had seen the appellant is holding MO1 which contains 5 litres of arrack on the date of the incident. Further, PW3 had stated that CW4 who seized MO1 and arrested the appellant from the place of occurrence and thereafter both the appellant and the contraband articles were produced before the Excise Office and on registering the crime the appellant was produced before the court on the next day with Ext.P6 thondi list. The evidence of PW3 is seen corroborated by PW5, the Excise Inspector who had continued investigation of the case and questioned the witnesses. PW6 is the Thondi Section Clerk who had given evidence that he had taken sample from the contraband for the purpose of analysis. PW5 the Excise Inspector

also proved that the sample was analysed by the Chemical Analyst and as per Ext.P5 chemical report, it was proved that the sample contains 18.33% by volume of Ethyl Alcohol which is nothing but illicit arrack. From the evidence now adduced by PWs.3,4 and 5, the prosecution succeeded in proving that the appellant was found in possession of 5 litres of arrack on the date of incident. Ext.P6 property list and Ext.P2 occurrence report would show that MO1 can containing 5 lires of arrack has been produced before the court on the next day of the detection of the crime and as per the evidence of PW6 the sample has been taken from MO1 and got analysed. If so, the trial court had justified in finding that the appellant was found in possession of 5 litres of arrack in MO1 can. The next question to be considered is that whether the appellant can be convicted under Section 58 of the Abkari Act or not. The trial court found in paragraph 13 of the judgment that the appellant was found in possession of 5 litres of arrack in a jerry can for the purpose of sale and if so the appellant has committed the offence punishable under Section 58 of the Abkari Act. But the possession of arrack in any form,

without having any license or permit, will attract only an offence under Section 8(1) read with Section 8(2) of the Abkari Act. Hence the finding of the trial court that the appellant has committed an offence punishable under Section 58 of the Abkari Act is not legally correct. However, the evidence adduced by the prosecution is acceptable, it is proved that appellant was found in possession of 5 litres of arrack on 23.6.1998. So this court is of the view that the conviction of the appellant entered by the trial court under Section 58 has controverted to that of conviction under Section 8(1) read with section 8(2) of the Abkari Act. Accordingly, the next question to be considered is that the sentence awarded against the petitioner is excessive or not. Considering certain aspects, the trial court imposed sentence of two years imprisonment and to pay one lakh rupees as fine and in default of payment of fine to undergo rigorous imprisonment for three months. However, it is seen that the appellant is a man of 67 years and his wife is a mental patient and is having two unmarried daughters. It is pertinent to note that the case has been detected on 23.6.1998 and the appellant was found

guilty only on 13.2.2007. That means, more than 8 years have elapsed for completing the trial after the detection of the crime and considering all these aspects, this court is of the view that a sentence of rigorous imprisonment for six months and a fine of Rs. 1 lakh with the default sentence of three months of rigorous imprisonment will be sufficient punishment for the petitioner. Accordingly, the appellant is sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.1 lakh (Rupees one lakh only) and in default of payment of fine to undergo a further period of three months rigorous imprisonment. It is seen that the appellant has already undergone imprisonment for 11 months.

5. Hence the appellant/accused in S.C.526/2005 on the file of the Additional Sessions Court, Neyyattinkara shall be released forthwith if he is not wanted in connection with any other case.

K.THANKAPPAN,
JUDGE

CSS

K.THANKAPPAN, J.

CRL.A.647 OF 2007

JUDGMENT

12.7.2007